



LEGAL UPDATES

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Subgrant Versus Contract: Getting it Right

Grantees frequently rely on subgrantees and contractors to execute a grant project. Yet grantees sometimes err in their classifications and label a subaward a “contract,” and vice versa. Misclassification leads to confusion, unmet legal obligations, and other undesirable consequences, including disallowed costs and unnecessary financial audits. This newsletter discusses ways to distinguish between subawards and contracts.

Why is it important to properly classify subawards/subgrants and contracts?

Because different legal obligations apply depending on the legal instrument. Subgrants are subject to the same federal regulations (2 CFR Part 200) as are the funds in the original grant. A grantee is responsible for ensuring not only its own compliance with the regulations, but also the subgrantee’s compliance. The regulations at 2 CFR 200.331 lists the requirements for subrecipient monitoring. In contrast, grant regulations do not “flow down” to contractors (although Appendix II in 2 CFR Part 200 lists provisions that must be included in all contracts).

Is it easy to tell the difference between a subgrant and a contract?

Sometimes, but the distinction is not always clear-cut, especially since grantees may refer to all subgrants as “contracts” or liberally use the term “partner.”

Then how can one tell the difference?

By looking at all relevant factors. The key is the substance of the relationship and intent, i.e., whether the entity is carrying out part of the program and fulfilling the public purpose of the grant—or is providing goods and services for *the grantee’s* benefit or for profit.

DEFINITIONS

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A subaward is an award from a grantee to a subgrantee to carry out part of a federal award.
2 CFR §200.92.

A subgrantee is a non-federal entity that receives a subgrant from a grantee to “carry out part of a federal program” but does not include an individual that is a beneficiary of such program.
2 CFR 200.93

A contract is a legal instrument by which a non-federal entity purchases property or services needed to carry out the project or program under a federal award. 2 CFR §200.92.

How can I tell if an entity is “carrying out a grant program” or is just providing goods or services?

This must be determined case-by-case by analyzing all the facts.

What kinds of facts should be considered?

Federal regulations at 2 CFR 200.330 list characteristics that support classification as a contract or subaward, as shown in this table below:

Contractor	Subrecipient
• Obtains goods or provides services which generally creates a procurement relationship • Usually provides these goods or services within normal business operations • Provides these goods and services to many purchasers • Generally operates in a competitive environment • The goods and services provided are ancillary to the federal program • A contractor does not generally participate in the design of the project • Little to no independent decision-making is involved • There is a commitment to deliver a good or service on a specific date or cost • The technology or products developed will not be owned by the contractor	• Creates a federal assistance relationship • Determines who is eligible to receive what federal assistance • Performance measured in relation to whether objectives of federal program were met • Has programmatic decision-making responsibilities • Must comply with program requirements • Uses the funds to carry out program for public purpose specific to the award • Substantive, programmatic work or an important or significant portion of the program is being undertaken • The receiving entity (subrecipient) retains some element of programmatic control and discretion • May have to provide cost sharing or matching funds

In addition, other factors that may be relevant include:

- *CFDA number.* Does the instrument cite the source of the funding by the CFDA number? A CFDA number is required for subawards but is not required for contracts.
- *Number of Awards.* It is unlikely that there will be multiple contracts for the same goods and/or services, but a grantee may make several subawards to fund similar goals and activities.
- *Creation of the Statement of Work.* Subgrantees often propose statements of work to a grantee. Federal regulations prohibit contractors from doing the same.
- *Performance Measures.* Subawards usually contain performance measures, whereas contracts usually identify specific deliverables. If a subgrantee fails to achieve its performance goals, the nonperformance may be considered reasonable and acceptable depending on the facts. If a contractor fails to deliver or perform, it will be in default.

- *Risk.* Subgrantees do not run the risk that contractors do; if contractors do not perform, they are not paid (among other consequences), whereas subgrantees generally receive funds even if they fall short of meeting all their goals.
- *Competition and Solicitation.* Is competition involved? Competition is required for contracts, but there is no government-wide requirement to compete subgrants.

What if characteristics of both a subaward and a contract are present?

The grantee should analyze all the relevant facts and use its judgment to choose the correct legal instrument.

Are there any characteristics that may help make a quick determination?

Yes. If the entity is a for-profit, will be making a profit from the work in question, or is an individual beneficiary of the grant program, the legal instrument will be a contract, not a subaward.

An individual cannot receive a subgrant?

No. A subgrantee must be a “non-federal entity” and does not include an individual that is a beneficiary of a program.

Why do “programmatic decision making” responsibilities tend to indicate a subaward?

An entity using its own judgment, discretion, and expertise to develop all or part of a grant program shows a high level of substantive involvement in the project and dedication to achieving the project’s public purpose. This contrasts with a contractor’s ancillary role in providing goods or services to benefit the grantee.

What is the significance of whether an entity’s performance will be measured?

In a grant/subgrant relationship, the recipient often will rely upon the subrecipient’s data to submit its own performance data.

Contractors do not report performance data.

DID YOU KNOW?

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Proper identification of a subaward or contract will affect the scope of an audit. All non-federal entities that expend \$750,000 or more during the fiscal year in any federal awards must have a single or program-specific audit conducted for that year. 2 CFR 200, Subpart F.

A subgrant is subject to a grantee’s single audit, which may examine how well the grantee oversees subgrantee compliance with federal regulations. A subgrantee might be required to perform a single audit itself depending on the amount of federal funds it expends that year.

On the other hand, contracts are examined in a single audit usually only to determine if expenditures were allowable, funds were awarded according to procurement regulations, and contracts contain the necessary clauses. Contractors are not required to perform single audits.

Can a non-federal entity concurrently receive awards as a grantee, subrecipient/subgrantee, and contractor?

Yes, depending on the substance of its agreements with ARC and pass-through entities/grantees.

Any final thoughts?

Remember, it's not the name of the instrument that determines what it is. Rather—

